

GOLDBELT, INC.

IBLA 82-1142

Decided March 12, 1985

Remand from United States District Court, District of Alaska, requiring further fact-finding and reconsideration of alternative easements offered in place of easement across Native corporation selection approved by Goldbelt, Inc., 74 IBLA 308 (1983).

Goldbelt, Inc., 74 IBLA 308 (1983), affirmed in part, vacated in part and remanded for evidentiary hearing.

1. Alaska Native Claims Settlement Act: Easements: Generally

When considering whether to reserve an easement across a Native land selection made pursuant to the Alaska Native Claims Settlement Act, the Department must consider, in addition to matters relating to the utility of the easement for the use sought, the impact of the reservation upon the Native corporation. The practicability of the use of other, non-Native lands as alternative easement sites must be considered. Such consideration should include the evaluation of alternative means to obtain the easement sought, including possible licensing arrangements proposed by the Native corporation.

2. Alaska Native Claims Settlement Act: Easements: Generally

In considering whether to reserve a transportation easement across a Native corporation's land selection made under the Alaska Native Claims Settlement Act, the Department must not restrict consideration of alternate access to sites which have existing actual road access.

3. Alaska Native Claims Settlement Act: Easements: Generally

An evidentiary hearing is properly ordered to receive further evidence concerning suitable alternative sites for a transportation easement where the record is inadequate to support a finding that there are no suitable alternative easement sites providing similar access.

APPEARANCES: Steven J. Pearson, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Alaska Regional Solicitor's Office, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

In Goldbelt, Inc., 74 IBLA 308 (1983), this Board affirmed a determination by the Alaska State Office, Bureau of Land Management (BLM), which had reserved transportation and site easements over land at Echo Cove near Juneau, Alaska, selected by Goldbelt, Inc. (Goldbelt), pursuant to section 17(b) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1616(b) (1976). Goldbelt, an Alaska Native urban corporation, had appealed from the BLM decision contending that other locations were available for use as transportation easements to provide public access into Berner's Bay which made reservation of the easements across the Goldbelt selection at Echo Cove unnecessary.

[1] Goldbelt appealed this Board's decision to the United States District Court, District of Alaska, which, in an order granting Goldbelt's motion for summary judgment on the record, reversed this Board's decision affirming the reservation of the Echo Cove easement. The district court

declared standards to be used to determine whether an easement may properly be reserved across the Echo Cove location for transportation purposes. In his memorandum opinion, filed with the order for summary judgment, District Judge von der Heydt held that, although this Board had adequately reviewed the record and established proper standards for evaluation of the evidence concerning the alternative easement sites, the Board erred by giving too much weight to the lack of road access to the various sites proposed by appellant as alternatives to the Echo Cove site. The court found that this Board had so emphasized road access that it had virtually made it a "threshold criterion" without which no alternative would be considered (Memorandum Opinion at 21). Judge von der Heydt also found that insufficient attention had been paid to the economic effect that reservation of the Echo Cove easement might have upon Goldbelt. Id. at 19, 20. In this regard, the memorandum opinion also requires that consideration must be given to the suitability of the Goldbelt proposal to license the Echo Cove site, pending development of alternative sites. Id. at 22.

[2] The district court affirmed this Board's finding that, in any case such as this, the burden lies upon the Native corporation to show the reasonableness of alternative sites offered in place of the reservation proposed by BLM. Id. at 9. Judge von der Heydt approved the standard of review as stated and applied by the Board's opinion in Goldbelt, Inc., supra at 313. Id. at 11. Judge von der Heydt also approved this Board's substantive rulings concerning evidence of prior use of the Echo Cove easement (Id. at 12), and the nature of the use reserved (Id. at 13). However, because of the emphasis placed upon usable road access to the Echo Cove site in Goldbelt, Inc.,

at 315, the district court determined that there should be further fact-finding concerning at least one of the alternative sites suggested, i.e., the proposed location at Sawmill Creek. Id. at 20.

While acknowledging the rule established by Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), admonishing the Federal courts to avoid intrusion into agency decisionmaking when reviewing discretionary decisions for abusive practices, the district judge found that the Department was not entitled to the usual deference paid to administrative agencies by the judicial branch because the Department of the Interior was not, in fact, qualified as an expert in handling easement adjudications of the nature involved in this appeal (Memorandum Opinion at 17). Thus, the court found the emphasis placed upon existing access ("real access"), by the Board in Goldbelt, Inc., was not based upon long-standing practice, nor upon agency "technical expertise." Id. at 17. Reviewing this Board's action to determine the correct application of the Department's regulations, the court found that the interpretation given by the Board to 43 CFR 2650.4-7(b)(1)(i), regulating reservation of transportation easements, was too narrow, and that additionally, too little attention was paid to the economic effect of easement reservations at Echo Cove upon the Native corporation. Id. at 17, 19, 20. The court concluded that, even were the emphasis placed upon "real access" not an erroneous approach, the policy of ANCSA which requires maximum Native participation in these cases would require that this matter be reopened to permit consideration of Goldbelt's offer to license use of Echo Cove under certain conditions. Id. at 15, 22. It is true, as the district court observed, that there have been very few Departmental precedents in this area.

The Department has established the rule that a decision reserving an easement supported by a rational basis is entitled to be sustained upon review. See, e.g., State of Alaska, 71 IBLA 256 (1983). In considering whether to sustain the reservation of an easement across Native lands a primary concern, so far as the easement itself is concerned, is whether there has been present existing use. See 43 CFR 2650.4-7(a)(3); Northway Natives, Inc., 69 IBLA 219, 89 I.D. 642 (1982), overruled in part, United States Fish & Wildlife Service, 72 IBLA 218 (1983). However, this requirement may not be applied to an evaluation of alternative sites proposed by a Native corporation in an effort to lessen an existing servitude upon selected lands. Such is the situation in this case. Sufficient facts concerning the Cowee Creek and Sawmill Creek locations should therefore be developed to permit the application of the balancing test required by Judge von der Heydt's opinion.

Judge von der Heydt's opinion also required, however, that this Board first reconsider "whether differences in the suitabilities of Bridget Cove and Cowee Creek sites for access to Berner's Bay render these proposed alternatives unreasonable." Id. at 20. Accordingly, the suitability of either of these two locations as a substitute for the Echo Cove site is now reconsidered by this decision.

At a hearing held from November 2 through 4, 1981, for the purpose of preparing a transcript and record for decisionmaking, evidence was received concerning the use of the Echo Cove site by the public. The possibility of the use of several alternative sites as substitutes for the site at Echo Cove were considered. Testimony concerning those alternative sites at Bridget Cove, Cowee Creek, and Sawmill Creek focused, however, almost exclusively

upon Bridget Cove. It was clearly this location which Goldbelt proposed as the preferred alternative to the Echo Cove location (Tr. 41).

This Board reached its decision in Goldbelt, Inc. based upon the record developed at the evidentiary hearing. In doing so, the Board refused to permit Goldbelt to reopen the evidentiary hearing to submit further proof concerning the practicability of the use of Sawmill Cove as an alternative site. The Sawmill Cove site, it should be mentioned, is also located within the Goldbelt selection, and would, therefore, involve the reservation of an easement across Goldbelt land. In March 1983 Goldbelt sought permission to show that a pending timber sale would extend the existing road from Echo Cove to Sawmill Creek and make Sawmill Creek a feasible substitute for Echo Cove (Id. at 311). Goldbelt also restated an offer to enter into licensing agreements providing for the use of Echo Cove pending development of the Sawmill Cove site. Since, however, the Board found that none of the three alternatives offered was a feasible substitute for the Echo Cove easement site, the question of the practicability of the offered licensing arrangement was not reached. Id. at 315.

The testimony at the 1981 evidentiary hearing was almost entirely devoted to a comparison of Bridget and Echo Coves. Ignoring, for the moment, the question of actual, present access to the Bridget Cove site, it is apparent that location does not provide small boats alternative access to Berner's Bay and the state tidelands at Echo Cove. Unlike the other two alternative sites, Bridget Cove is not located upon, or adjacent to, Berner's Bay, but is situated on Lynn Canal (Tr. 39, 40, 60, 129). Maps and testimony admitted at the Administrative Law Judge's hearing establish that, while small boats

can travel from Lynn Canal to Berner's Bay, when doing so they must navigate a channel bounded by rock walls which afford no haven in changeable weather (Tr. 169-171). As a result, the use of Bridget Cove to obtain access to Berner's Bay may pose a threat of danger to small boats without motors which is present in none of the other possible access sites (Tr. 306-61, 339-43, 411-15, 425; 449-92; 508-28). There is also indication that Bridget Cove may be too rocky to permit construction of a boat launching ramp (Tr. 119). There is, however, some conflicting testimony which indicates that Bridget Cove and Echo Cove are substantially similar, and that both are usable by small boats. See, e.g., Tr. 53, 104, 131, 150. Since the other two alternatives, Cowee Creek and Sawmill Creek, were not examined in detail at the 1981 Administrative Law Judge's hearing, it is difficult to say on the basis of the record, whether Cowee Creek may be superior to Bridget Cove for boat transportation purposes.

However, wholly aside from any problem in launching a boat caused by the Bridget Cove site, the testimony of boaters using both sites and boating in the vicinity of Berner's Bay establishes that Echo Cove is a far superior site for small boat access to Berner's Bay. This Board now finds, as a fact, that safety considerations rule out Bridget Cove as a satisfactory alternative to Echo Cove for small boats.

[3] The record now before us does not permit a realistic comparison of Cowee Creek to either Bridget Cove or Echo Cove. The Cowee Creek site was apparently blocked in some way in 1981, and, like the Sawmill site, there was little testimony concerning Cowee Creek. In fact, there is more information in the record concerning the access, suitability, and comparability of Sawmill

Creek, than there is with respect to the Cowee Creek site. Since additional fact-finding is required concerning the Sawmill site, perforce more evidence is also required before a reasoned comparison of Cowee Creek and Echo Cove can be made.

Both Cowee Creek and Sawmill Creek provide direct access to Berner's Bay. Since a hearing concerning the Sawmill site is required by the district court opinion (Memorandum Opinion at 20, 21), that hearing should also include an inquiry into the possible use of Cowee Creek as an alternate site. This is consistent with the court's observation that the Cowee Creek site should be reconsidered (Memorandum Opinion at 20).

While the remanding judgment forbids the Department to make the existence of present road access to any proposed alternative site a "threshold requirement," it must be emphasized that access must nonetheless be a factor, and an important one, in evaluating the suitability of any site. What the memorandum opinion apparently requires is a stated finding as to each alternative site of the economic effect any easement reservation will have upon Goldbelt; the district court opinion requires that adjudication of this matter consider how the "economic potential" of the land selected by the Native Corporation can best be preserved to Goldbelt, consistent with the right of the public to retain access to Berner's Bay (Memorandum Opinion at 18, 19, 20). This balancing test must be applied when judging the merits of Sawmill Creek and Cowee Creek, as alternative sites.

It appears that other alternate sites may also exist, although not mentioned in any part of the record so far developed. Appellant has suggested

that, prior to hearing, the parties conduct a conference with a view towards settlement of all the principal issues on appeal, at which time (if agreement is not possible), a schedule could be established for disclosure of witnesses and other arrangements could be made for a hearing. Since at any hearing Goldbelt must first establish proof to show that a suitable alternative easement site exists and second, present evidence concerning the economic effect of the continued use of Echo Cove upon Goldbelt, it would clearly be appropriate in this case for the Administrative Law Judge to determine that there should be a conference between the parties prior to hearing in order to establish procedures for the required fact-finding. At any such conference scheduled by the Administrative Law Judge, Goldbelt should be prepared to disclose which site or sites it believes to be reasonably suitable alternatives to Echo Cove. If other sites, in addition to Cowee Creek and Sawmill Creek, are proposed, they should also be considered at the subsequent hearing; the expected proof concerning those sites also should be outlined at the conference.

Accordingly, this matter is referred to the Hearings Division for assignment of an Administrative Law Judge who will conduct an evidentiary hearing to permit Goldbelt to supplement the record made in 1981 concerning alternatives to use of the Echo Cove transportation easements reserved by BLM. Goldbelt objects to the designation of Administrative Law Judge Clarke, who has also expressed a reluctance to conduct further hearings on this matter. See Tr. 315. Another Administrative Law Judge should therefore be appointed to conduct the required fact-finding.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is referred for hearing to determine whether Cowee Creek or Sawmill Creek provide alternative access to Berner's Bay instead of the Echo Cove site. The Administrative Law Judge's prehearing order shall include a provision requiring that Goldbelt's alternative proposals for licensing public use of Echo Cove be submitted in writing prior to hearing, for incorporation into the record; a provision that alternative proposed transportation sites to be considered at hearing shall also be identified prior to hearing; and that lists of witnesses shall be exchanged. Following hearing, the Administrative Law Judge shall issue findings of fact, conclusions, and a decision. The findings of fact shall include findings concerning (1) the existence of an alternative site to Echo Cove, and (2) the economic effect of this finding, if any, upon Goldbelt. In determining the existence of reasonable alternatives, any licensing proposal offered by Goldbelt shall be considered. The decision by the Administrative Law Judge shall, absent appeal to this Board, be final for the Department.

Franklin D. Arness
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

